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Supreme Court, U.S.
FILED
AUG 16 1996
CLERK

No. 96-089

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA ex rel.,
JAMES M. HAGOOD,

Petitioner,

v.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. Whether pursuant to 31 U.S.C. § 3730(e)(4) there is no subject matter jurisdiction over Hagood's claim that fixed repayment dates in a water supply contract violated the 1958 Water Supply Act where long before he made that claim the use of fixed payment dates was disclosed in the news media, challenged in public filings with both the Federal Energy Regulatory Commission and the U.S. Court of Appeals for the D.C. Circuit and discussed in that court's published opinion.

2. Whether pursuant to 31 U.S.C. § 3730(e)(4)(B) a *qui tam* relator can qualify as an original source of information with respect to a claim based upon information not provided by the relator to the Government before filing the *qui tam* action.

3. Whether Hagood can rely on the original source exception to the jurisdictional bar of 31 U.S.C. § 3730(e)(4)(A) where he failed to argue that he was an original source in the district court.

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SUMMARY OF ARGUMENT

This case centers on Hagood's legal interpretation of the 1958 Water Supply Act (the "Water Supply Act") and his contention that certain provisions of a water supply contract between Sonoma County Water Agency (the "Water Agency") and the Army Corps of Engineers ("Corps") violate that Act. In opposing summary judgment, the two contract terms which he claimed violated the Water Supply Act are (1) the cost percentage allocated to the Water Agency and (2) the use of fixed repayment dates based on projections of when water would be first used.[1] Hagood's petition concerns only the fixed repayment date issue as Hagood has abandoned his cost allocation claim, which was rejected by both courts below.

The district court and the Ninth Circuit correctly ruled that there is no jurisdiction over Hagood's claim that the use of fixed repayment dates in the contract violates the Water Supply Act. Both courts based their decisions on the 1986 amendments to the False Claims Act which bar jurisdiction over a *qui tam* action "based upon the public disclosure of allegations or transactions in a . . . civil or administrative hearing, . . . or from the news media, unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). Here, the fact that the contract included fixed repayment dates was publicly disclosed in administrative proceedings, civil litigation and the news media long before this action was filed. Indeed, Hagood's very

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[1] The Water Supply Act provides "no payment need be made with respect to storage for future water supply until such supply is first used."

argument – that fixed repayment dates based on estimated use violated the Water Supply Act – was made by a third-party in prior litigation. Moreover, Hagood did not – and could not – present evidence to meet the test of an "original source."

STATEMENT OF THE CASE

The Water Agency's repayment obligations are set forth in the 1982 water supply contract with the Army Corps of Engineers.[2] The contract includes provisions governing (1) the duration of the Water Agency's repayment obligations; (2) the deferral of interest payments; (3) the percentage of certain costs to be repaid by the Water Agency; and (4) fixed repayment dates based upon projected dates of first use.[3]

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[2] A more complete statement of the case may be found in the Ninth Circuit's opinion below. (SA-1.) The Water Agency presents this abbreviated statement to focus on facts particular to the issues raised by the petition.

[3] The Water Supply Act contains separate provisions as to each of these matters. The duration of the repayment term is stated as costs "shall be repaid within the life of the project but in no event to exceed fifty years after *the project is first used for the storage of water*. . . . " The Act allows separately for a deferral of interest: "no interest shall be charged on such cost *until such supply is first used*, but in no case shall the interest-free period exceed ten years." The allocation of costs is another, distinct provision: the allocation of costs "shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army." Finally, as to the initiation of repayment, the Act provides, "no payment need be

While with the Corps, Hagood raised concerns as to the first three provisions. After Hagood questioned the duration of the Water Agency's repayment obligation, the draft contract was revised and a 50-year repayment term was implemented in the final contract. Hagood also questioned "the deferral of interest payments allocated to future water supply beyond ten years after the plant in service date." (SA-37 *and see* SA-45.) The final contract, however, required that the repayment of interest begin by 1993 – within ten years of the plant in service date. Thus, both of these expressed concerns were resolved with the final contract, which was revised and approved after Hagood was no longer involved in the project. Neither of these first two issues was raised by Hagood in opposing the motion for summary judgment.

Hagood's concern as to the cost allocation issue was raised by Hagood while he was with the Corps,[4] rejected by both courts below, and is not included in Hagood's petition.

Unlike the other three provisions, Hagood did *not* raise any concern as to the use of fixed repayment dates while he was with the Corps. Contrary to statements included in Hagood's writ petition, the memoranda written by Hagood while he was with the Corps (SA-37 through SA-54) are silent as to any concern with fixed repayment dates based on estimated first use dates. This

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made with respect to storage for future water supply *until such supply is first used. . . .* " (Emphasis added throughout.)

[4] In fact, discussion of the cost allocation issue began before Hagood's involvement with the contract and continued thereafter.

fact was noted in the proceedings below. (*See, e.g.*, Opinion of Court of Appeals at A-7 n. 6 and A-17.) Nor is there any evidence in the record that Hagood ever raised this concern while with the Corps.

Indeed, Hagood's assertion now that he raised the issue of fixed repayment dates, either in his memoranda or otherwise, is directly contradicted by the record. In the Water Agency's statement of undisputed material facts in support of its summary judgment motion to the district court, the Agency included the statement that while with the Corps "Hagood did not raise the issue of the propriety of fixed repayment dates based on estimates of first use for water supply." In Hagood's statement in response, he admitted that this fact was undisputed. (App. 2.)[5],[6]

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[5] In addition to admitting that this matter was undisputed, Hagood objected on the basis of relevancy.

[6] In addition to misstatements as to disclosures regarding the fixed repayment dates, the petition contains other erroneous representations. For example, the petition asserts that the dam project was enlarged upon the initiative of the Water Agency. Not so. The dam was enlarged because, in early 1967, the Corps proposed to "optimize" project benefits by increasing the capacity of the reservoir. The Corps requested the Water Agency's commitment to assume this increased obligation and, based on information from the Corps and with the understanding that the additional water supply would be treated as a fourth block of water, the Water Agency provided that assurance. The prior 1964 contract provided for fixed repayment dates for three blocks of water.

Hagood also asserts that the Water Agency fraudulently failed to begin repayment "upon the trigger date of 'first use.' " (Pet. 4-5.) It is telling that Hagood does not attempt to define what he means by "first use" in making this contention. If Hagood means releases of water for non-consumptive

Nor did Hagood raise the issue of fixed repayment dates when he first brought this *qui tam* action. In fact, the *only* contract provision Hagood asserted was illegal in his mandatory section 3730(b)(2) disclosure statement to the Government when this action was filed was that of the cost allocation.[7] (App. 3-9.)

However, long before this action was filed, the very argument now made by Hagood – that the use of fixed repayment dates violates the Water Supply Act – was made by the City of Ukiah in administrative proceedings before the Federal Energy Regulatory Commission ("FERC") and a civil action arising out of those proceedings. This argument was first made by Ukiah in letters

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purposes, the D.C. Circuit in *City of Ukiah* ruled that such releases would not trigger repayment obligations. If Hagood is arguing that the Water Agency caused releases to be made for consumptive purposes, both the district court and the court of appeals found that Hagood presented no evidence to support that claim. (A-19 n. 17 and A-42 n. 4.) And if Hagood means that "first use" for purposes of repayment occurred when water was first stored in the dam, his position is contrary to the clear language of the Water Supply Act, which states "no repayment need be made with respect to storage for future water supply until such supply is first used" – not when storage first occurs. (SA-35.)

[7] While Hagood's disclosure made a generalized reference to an avoidance of payments, nowhere is it asserted that this pertains to the issue of fixed repayment dates. In fact, because Hagood indicates repayment should have been initiated in 1984, it is clear that he was discussing something other than the initiation of repayment upon first use of water supply. In any event, Hagood's disclosure focusses solely on the cost allocation issue.

and briefs filed with FERC in 1982.[8] After FERC rejected Ukiah's arguments, the city sought review before the U.S. Court of Appeals for the D.C. Circuit. In its filings with the D.C. Circuit, Ukiah again argued that the fixed repayment dates provisions violated the Water Supply Act.[9]

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[8] On July 1, 1982, Ukiah wrote the Corps with objections to the proposed contract as being in violation of the 1958 Water Supply Act. Specifically, Ukiah argued that the fixed repayment dates violated the Water Supply Act because the Water Agency could use water before those dates without having to commence repayment. (SA-55.) On July 9, 1982, Ukiah again wrote the Corps regarding its objections to the contract. In this letter, Ukiah asserted that the Water Agency's argument to FERC, that the contract "establish[ed] a schedule of fixed payments to be made regardless of when water is actually first used," confirmed its contention that the contract was in violation of the Water Supply Act. (App. 10, 11.) On July 12, 1982, Ukiah caused its two July 1982 letters to be placed in the record of the FERC proceedings. In a subsequent brief filed with FERC, Ukiah again argued that the proposed contract would violate the Water Supply Act:

> The Water Supply Act of 1958 requires repayment within 50 years of the initiation of water storage and actual payments to begin upon first use of stored water. Accordingly, if the contract allowed Sonoma to direct releases without requiring repayment, it is Ukiah's position that the revised contract is violative of the 1958 Act and could be successfully challenged in court.

[9] In this regard, the D.C. Circuit Court of Appeals noted Ukiah's "argu[ment] that the 1982 contract is illegal under the [Water Supply Act] because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes." *City of Ukiah v. FERC*, 729 F.2d 793, at n. 11 and *see* n. 12 (D.C. Cir. 1984).

The D.C. Circuit rejected Ukiah's argument, holding the Water Agency could direct releases for non-consumptive purposes without triggering repayment under the Water Supply Act. *City of Ukiah, supra*, at 798-99. Since the appeal involved only non-consumptive uses, the court did not resolve whether other uses of water would trigger repayment under the Water Supply Act. Nevertheless, the court stated:

> Article V [the repayment provision] of the 1982 contract adheres strictly to the 50 year payback requirement and effectively to the initial repayment clause. While initial repayment may occur after the water supply is actually used for consumptive purposes, the fixed repayment schedule was drawn to reflect precisely the parties' best mathematical estimates of when consumptive use would actually begin. *Id.* at 797 nn. 11 and 12.

Thus, the D.C. Circuit (1) held that use could be made of the water supply without triggering repayment obligations and (2) recognized that the use of fixed repayment dates in the contract was not intended to delay the initiation of repayment but to identify when first use would occur as best as could be estimated.

After the contract was signed, and before Ukiah's appeal was resolved, local newspapers reported on the contract. One such article, appearing in the Santa Rosa *Press Democrat* two days after the contract was signed, reported that the contract had a fixed repayment schedule, stating "Payments do not begin until 1993 regardless of the fact the county might begin using water earlier."

REASONS FOR DENYING THE WRIT

There is no compelling reason for granting review of this case. The jurisdictional standards of the False Claim Act are not in the state of flux which Hagood describes. Moreover, review of this case would not be appropriate as the arguments presented by Hagood are not supported by the facts necessarily decided by both courts below. Indeed, for this Court to dispose of Hagood's claims, it would have to engage in a fact-finding exercise, a task rarely appropriate for this Court's attention.

I. HAGOOD MISPERCEIVES THE JURISDICTIONAL REQUIREMENTS OF THE FALSE CLAIMS ACT AND HIS ARGUMENTS ARE NOT SUPPORTED BY THE FACTS DETERMINED BY BOTH COURTS BELOW.

Hagood makes three primary arguments as to why the disclosures made in the FERC administrative proceedings and D.C. Circuit do not constitute public disclosures within the meaning of the False Claims Act. These arguments (1) ignore the fact that Ukiah had previously argued that fixed repayment dates violated the Water Supply Act and (2) rely upon the mistaken assertion that Hagood raised this issue while with the Corps.

Hagood's first argument is that "the FERC proceeding was never faced with an allegation by Ukiah or anyone else that Sonoma had committed fraud." However, neither the language of section 3730(e)(4) nor any circuit decision addressing that provision requires that an allegation of fraud be included in a prior public disclosure to raise this jurisdictional bar.

The case upon which Hagood primarily relies does not address section 3730(e)(4), but pertains to a separate

jurisdictional bar, with different requirements. In *United States ex rel. S. Prawler & Co. v. Fleet Bank*, 24 F.3d 320 (3d Cir. 1994), the issue of jurisdiction involved section 3730(e)(3), not (e)(4). Section (e)(3) is significantly different from (e)(4) as it bars *qui tam* actions "based upon allegations or transactions *which are the subject of* a civil suit or an administrative civil monetary proceeding *in which the Government is already a party.*" (Emphasis added.) In looking at this provision, the *Fleet Bank* court focussed both on the inclusion of the phrase "the subject of" and the fact that the prior proceedings must involve the Government as a party. *Id.* at 327 and 328. Given these parameters, the *Fleet Bank* court concluded that (e)(3) barred *qui tam* actions only where there had been a prior action in which the Government has sought to remedy an alleged fraud.

Unlike (e)(3), section (e)(4) more broadly pertains to public disclosures made not only in civil or administrative proceedings, but also made in the news media and other contexts. Moreover, section (e)(4) does not require that transactions or allegations be "the subject of" other proceedings, only that they be disclosed. Nor does section (e)(4) require that the Government be involved with any prior disclosure. Section (e)(4), therefore, establishes a jurisdictional bar for a far broader range of disclosures than section (e)(3).

On the other hand, section (e)(4) provides for an important caveat – it allows a person to maintain a *qui tam* action even where there has been prior public disclosure if that person qualifies as an original source. This is unlike section (e)(3), which imposes an absolute bar where the Government has already been involved with an attempt to obtain a monetary recovery in another

proceeding. Hagood's position, that section (e)(4) bars jurisdiction only where fraud has been alleged and the Government has had an opportunity to remedy such, would effectively nullify these distinctions and render section (e)(4) duplicative of (e)(3).

First, it would narrow the type of public disclosures covered by section (e)(4). For example, public disclosures made in the news media, which are expressly listed in section (e)(4), do not provide a vehicle for a monetary recovery, and, thus, would not bar a subsequent action under Hagood's analysis. Second, by requiring that a public disclosure occur in connection with a situation where the Government had the opportunity to obtain a remedy, Hagood's interpretation would effectively require the Government to be a party to a proceeding seeking a remedy. If that were the case, the absolute bar of section (e)(3) would apply and the original source exception to (e)(4) would presumably be overridden.

Circuit decisions are uniform in rejecting the argument made by Hagood. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (public disclosure was *not* an allegation that Bradley had "defrauded the government" through selling vehicles, but only the disclosure of selling vehicles with defects); *U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1157-58 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993) (*qui tam* action barred by prior public disclosure not of allegations of fraud but of a defective condition in helicopters sold to the Government); and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co. ("Prudential")*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (in *qui tam* action alleging insurer's claims handling procedures

resulted in fraud, public disclosure found in disclosure of the insurer's internal memoranda which obviously did not allege fraud but instead contained the claims handling information upon which the *qui tam* allegations were subsequently based).

The decision cited by Hagood, *U.S. ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), is in accord with this line of authority. This is shown in the very passage cited by Hagood: "The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions only when *either* the allegation of fraud *or* the critical elements of the fraudulent transaction themselves were in the public domain." *Id.* at 654 (emphasis added). Thus, it is not required that the prior action must have actually included an allegation of fraud. Instead, where as here, the facts comprising the supposed elements of the alleged fraud are publicly disclosed, that, too, will act to bar a *qui tam* action.[10]

Hagood's next assignment of error is merely a recasting of his first argument. Hagood argues that the Ninth Circuit should not have found public disclosure as to the

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[10] In arguing his point, Hagood also takes a solitary phrase from the Ninth Circuit opinion as evidencing failure to comply with section (e)(4). In the opinion, the Ninth Circuit characterized Ukiah as having "all but accused the Water Agency of fraud in its letters to the Corps." (A-16.) Hagood argues that this statement "is in conflict with the clear language of the statute which expressly requires an 'allegation.' " Hagood misreads the statute – it requires public disclosure of *either* allegations *or* transactions. Hagood also selectively ignores the remainder of the opinion which demonstrates that the Ninth Circuit's decision rested on much more than this statement.

FERC proceedings because those proceedings "did not have the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury." Again, as shown above, this is not a requirement of the statute. And, such a requirement would be absurd given that section (e)(4) bars jurisdiction where there has been public disclosure in the news media and other contexts where there is no "substantive capacity" for a monetary recovery.

Hagood's final dispute as to the public disclosure issue is that the "*qui tam* action was not 'based upon' the public disclosure of any matters in the FERC proceeding." Although unclear, it appears that Hagood is arguing that the public disclosure bar applies only if the *qui tam* action is derivative of the earlier public disclosure. This position has been rejected by nearly every circuit to consider it. *See, e.g., Springfield, supra,* 14 F.3d at 654-55 (D.C. Cir. 1994); *Kreindler, supra,* 985 F.2d at 1158 (2d Cir. 1993); *United States ex rel. Precision Co. v. Koch Industries,* 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied,* 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.,* 960 F.2d 318, 324 (2d Cir. 1992); *Wang, supra,* 975 F.2d at 1416-17 (9th Cir. 1992); *Prudential, supra,* 944 F.2d at 1155-56 (3d Cir. 1991). The only circuit which apparently does not follow the majority rule is the Fourth Circuit. *See, e.g., United States ex rel. Siller v. Becton Dickinson & Co.,* 21 F.3d 1339, 1347-48 (4th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 316 (1994). In reaching its decision, the Fourth Circuit relied upon the same statutory language and legislative history interpreted by other courts of appeals to reach a contrary holding.

For example, the Third Circuit emphasized that the legislative history compels rejection of the position taken by Hagood:

> One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the "conspiracy of silence" among employees of corporations engaging in fraud. . . . The Senate Report stresses that in order to detect fraud it was necessary to enlist the "cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *Prudential, supra,* 944 F.2d at 1154.

The public disclosure bar is one means of encouraging people not to sit on information of perceived fraud. By providing that persons may lose the right to pursue *qui tam* actions where another has already made a disclosure, this bar provides incentive for people to act, not wait. The bar further comports with the "twin goals of rejecting suits which the Government is capable of pursuing itself, while promoting those which the Government is not equipped to bring on its own." It would be pointless to allow a person to maintain a *qui tam* action where, as here, the claims are based upon information thoroughly disclosed long before. *See, e.g., Springfield, supra,* 14 F.3d at 651.[11]

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[11] Practical considerations also warrant rejection of Hagood's argument. Pre-trial determinations of the source of a relator's allegations would prove onerous and impractical to both the parties and the court. *See, e.g., Precision Co., supra,* 971 F.2d at 553. This is easy to see in a case such as this. At no time

For years, the circuit courts of appeal have uniformly applied the jurisdictional bar of section (e)(4)(A). The decision below comports with the line of authority. Only one circuit has presented an interpretation of that provision which comports with that argued by Hagood. This solitary case is not, of itself, reason to review the Ninth Circuit's decision here.[12]

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while with the Corps did Hagood indicate any concern as to the use of fixed repayment dates in the contract. When Hagood provided the mandated disclosure to the Government at the time of filing this action, he again did not raise any concern as to the fixed repayment dates but asserted that the contract was illegal because of the cost allocation. Only after the initiation of discovery and citation to the *City of Ukiah* decision in various pleadings did Hagood advance the claim that the fixed repayment dates constituted a separate basis for finding the contract illegal. Given the belatedness of this claim, it would surely be unwieldy to attempt to trace whether Hagood's claim is derived from something other than previously publicly disclosed materials.

[12] Hagood makes one final argument as to the newspaper article. He argues that under *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994), the article could not have constituted a public disclosure because, he asserts, it did not "raise a reasonable inference of fraud." Reliance on *Rabushka* is misplaced. In that case, the majority looked only at portions of prior newspaper articles which spoke generally about pension-funding problems in an industry and developments with regard to a particular company which indicated that this company also faced these problems. *See, e.g., id.*, at 1512. The *Rabushka* majority thus concluded that these articles did not point to any fraud as to the particular company. Here, however, Hagood's entire claim as to the use of fixed repayment dates is that such provision would allow the Water Agency to begin using water without initiating repayments. This is exactly what was revealed in the newspaper article. That Hagood has characterized this transaction as illegal does not

II. HAGOOD'S ARGUMENT THAT HE IS AN ORIGINAL SOURCE RESTS ON A MISSTATEMENT OF FACT AND IGNORES THE DISCLOSURE REQUIREMENTS OF 31 U.S.C. SECTION 3730(e)(4)(B).

Hagood's arguments as to the Ninth Circuit's ruling that he was not an original source all rest on his faulty assertion of fact – Hagood asserts that he is an original source of this claim because he first raised the issue in his internal Corps' memoranda. As discussed above, this is not so. The memoranda to which Hagood refers discuss other, different issues. Comparison of those memoranda to the provisions of the Water Supply Act and the contract requirements clearly show that Hagood was not addressing the separate issue of fixed repayment dates. That the memoranda do not discuss the issue of fixed repayment dates was admitted by Hagood in his opposition to the Water Agency's motion for summary judgment. Further, the court below expressly concluded that the memoranda did not raise any issue as to the fixed repayment dates. (Opinion of Court of Appeals at A-7 n. 6 and A-17.)

Thus, granting a writ of certiorari would require this Court to sift the evidence reviewed by both lower courts in order to determine whether they erred as to this point of fact. Certiorari is not usually granted for this purpose, and there is no compelling reason to depart from this longstanding practice here. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925). "A court of law, such as this

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diminish the fact that the entirety of the subject transaction was publicly disclosed in this article.

Court is, rather than a court for the corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Building on his erroneous statement of facts, Hagood goes on to argue that the Ninth Circuit erred in holding that a relator cannot be an original source "if the relator republishes an allegation that has already been ~~pu~~blicly disclosed even if that person has direct and independent knowledge of the fraud." (Pet. 24.) This argument, of course, presumes that Hagood had direct and independent knowledge, a fact not found by either of the courts below and directly contrary to Hagood's own admissions below.

In any event, adoption of Hagood's positions would contravene the purposes of the jurisdictional bar. To avoid parasitic suits and otherwise advance the purposes of the False Claims Act, circuit courts of appeal have held that where there has been prior public disclosure, would-be relators must have been the source of the information previously disclosed. *See, e.g., Wang, supra*, 975 F.2d at 1418 (9th Cir. 1992); *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990). As one commentator notes, both "simple logic" and "congressional intent" support this requirement since it "ensures that only the true whistleblower can bring the qui tam suit and prohibits rewarding parasitic suits by those who do not come forward first." Boese, *Civil False Claims and Qui Tam Actions* (1994) at 4-52 to 4-53. Were Hagood allowed to

proceed, he would merely echo claims publicly disclosed and debated long ago in other litigation.

Finally, regardless of any factual dispute or other issues raised by Hagood, review of the Ninth Circuit's decision is unnecessary as it must be sustained on other grounds. As Hagood even admits, one prerequisite to qualifying as an original source is voluntarily providing to the Government before the *qui tam* action is filed the information on which the action is based. 31 U.S.C. § 3730(e)(4)(B). Hagood's disclosure did not assert a claim as to fixed repayment dates, let alone provide any information to the Government with regard to that issue. Instead, Hagood's disclosure was limited to the cost allocation claim, which is no longer at issue. Accordingly, because Hagood made no initial disclosure as to the claim presented for review, he cannot qualify as an original source. The Ninth Circuit's decision should not be disturbed.

III. THE DECISION BELOW MUST BE UPHELD BECAUSE THE WATER AGENCY DID NOT PRESENT OR CAUSE TO BE PRESENTED A FALSE CLAIM WITH REGARD TO THE USE OF FIXED REPAYMENT DATES.

Regardless of the outcome of the jurisdictional bar question, judgment in favor of the Water Agency was proper as Hagood could not demonstrate that the Water Agency knowingly caused false information to be submitted to the Government. Because both the district court and the court of appeals found no jurisdiction as to Hagood's repayment claim, neither ruled on whether the

issue presented a false claim. Had they examined the issue, summary judgment would have been affirmed on this basis, too.

Hagood did not show the contract was based on false information. There was nothing presented to indicate that the use of fixed repayment dates constituted a false claim. There was no evidence nor even an argument that somehow the estimated use dates were "falsely" calculated. Nor was there any evidence that the Water Agency otherwise made any false representation as to the fixed repayment dates. There is no question but that the Corps was well aware of the presence of that provision and the potential issues raised by its inclusion in the contract. In all, Hagood's allegations and the facts merely show, at most, that there was a legal dispute over the appropriateness of using fixed repayment dates based on estimated first use, not concealment or misrepresentation. This does not rise to the level of a false claim under any court's analysis.

Even if the use of fixed repayment dates was "false," there is no showing that the Water Agency knowingly caused the presentation of a false claim. Hagood did not meet his burden of proving that the Water Agency played an active part in presenting a contract which it knew was based on false information – there is no evidence that the Water Agency somehow believed that the use of fixed repayment dates tied to estimated dates of first use was somehow improper or beyond the Corps' authority.

Rather than presenting evidence, Hagood argued below that the Water Agency "must have known" of a falsity because it sought help in facilitating contract

approval. Hagood used this argument in alleging fraud as to both the fixed repayment dates claim and the cost allocation claim. Because the argument also pertained to the cost allocation claim, it was considered by both the district court and the court of appeals. Both courts below rejected this argument because Hagood presented no facts to support it. Hagood should not now be allowed to raise this factually devoid claim to this Court.

CONCLUSION

For the foregoing reasons, review should not be accepted. Hagood's petition rests on misstatements of fact, and misperceives both the False Claims Act and the court decisions applying the jurisdictional bar of that act. Were review granted, this Court would necessarily have to engage in a fact-finding expedition which is neither warranted nor appropriate.

Respectfully submitted,

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APPENDIX A

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Ronald H. Wecht (State Bar #67962)
ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

U.S.A. *ex rel* **JAMES M. HAGOOD,**

Plaintiffs,

v.

SONOMA COUNTY WATER AGENCY,

Defendant.

_____/

NO. C-88-0991-CW

PLAINTIFF'S STATEMENT OF GENUINE ISSUES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND STATEMENT OF OBJECTIONS TO EVIDENCE

Date: February 10, 1995
Time: 10:30 a.m.
Dept: Honorable Claudia Wilken

Plaintiff submits this statement of genuine issues and statement of objections to evidence in opposition to the motion for the summary judgment filed by defendant Sonoma County Water Agency.

* * *

27. In internal Corps meetings and correspondence of November 26, 1981, November 30, 1981, March 17, 1982 and March 25, [1982], Hagood adamantly expressed his "legal opinion" that the proposed contract did not comply with the 1958 Water Supply Act because: (1) the draft contract did not comply with the requirement that the "entire costs" allocated to water supply storage be repaid within 50 years as the contract provided a separate 50-year repayment schedule as to each respective block of water; (2) there was "no legal basis for authorizing the deferral of interest payments allocated to future water supply beyond 10 years after the plant in service date;" (3) the optimization of the project in 1967 had not been properly authorized by Congress, resulting in a lack of Congressional review and approval of a cost allocation for the enlarged project; and (4) a new cost allocation would need to be prepared by the Corps. Hagood did not raise the issue of the propriety of fixed repayment dates based on estimates of first use for water supply.	27. Undisputed. Objection. Relevance.

* * *

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April 8, 1988

Mr. Joseph P. Russoniello
U.S. Attorney
Department of Justice
450 Golden Gate Avenue
San Francisco, CA 94102

RE: *United States of America ex rel. James M. Hagood v. Sonoma County Water Agency, et al.*
United States District Court for the Northern District of California
Civil Action No. C880991EFL

Disclosure Statement Under 31 U.S.C. Section 3730

Dear Mr. Russoniello:

Under 31 U.S.C. Section 3730 enclosed herewith is the disclosure statement and documentary evidence (48 tabs of documents in attached 3-ring binder) relating to the above-referenced suit. These materials and the narrative information contained in this letter are being submitted by qui tam plaintiff James M. Hagood to the United States for review and consideration. Both Mr. Hagood and his counsel herein are available to further explain and review the evidence in this lawsuit.

This is an action under the False Claims Act, 31 U.S.C. Section 3729 et seq., concerning the Warm Springs

Dam Project in Sonoma County, California. It is an action to recover amounts not repaid between 1984 and 1988 to the United States as a result of false claims, and for other amounts falsely understated so as to avoid repayments to the United States. As of March 1988, four years after completion of the Federal Dam Project, no amounts of money have been repaid to the United States, although required by statute under 43 U.S.C. Section 390b and 16 U.S.C. Sections 460(L)(12)-(L)(14), as amended by P.L.93-251. Specifically, the law dictates that the Government bears costs only to the extent they are properly allocated for flood control, without repayment, but the local interest (in this case the Sonoma County Water Agency) must fully reimburse the Government for costs which are required to be properly allocated for water supply and recreation facilities, as modified, and as provided by the above-referenced 1958 Water Supply Act and The Federal Project Recreation Act.

Mr. Hagood has personal knowledge of the Project acquired between 1972 and the present. During the relevant periods 1972 through 1986, Mr. Hagood was a civilian attorney working for the district office of the Army Corps of Engineers in San Francisco and Sacramento.

In early 1982 Mr. Hagood was asked by his superior, Steve Lingenfelter, to prepare a new repayment contract to replace the 1964 contract which was based upon projected costs of approximately $42,000,000 and a smaller project. Mr. Hagood made inquiries as to the preparation of a new cost allocation, as required by the statute, and as required by officials in Washington D.C. (see Tabs 7 and 11). Instead, Mr. Hagood was handed a letter dated October 24, 1974, which was signed by Henry Pape, who had

been the Chief of Engineering for the Corps in San Francisco. The letter was directed to the Sonoma County Water Agency, and apparently pre-set the cost allocation, although the costs had not been incurred or set at that time. (See Tab 14). Prior to 1982, Mr. Hagood had never seen the letter in question. It was also shown to him by Robert F. Beach, the General Manager of the Sonoma County Water Agency, when Mr. Hagood discussed the matter with him. The letter was used to pre-empt any further discussion about a required and current cost allocation. The percentage reflected in the letter was simply taken from the 1969 General Design Memo, again prior to the actual and current costs incurred for the Project, as modified.

Mr. Hagood was essentially informed that a cost allocation was not going to be performed based on the true costs, as they had been expended as of 1982. When Mr. Hagood was ordered to prepare the repayment contract in 1982 using the rate that had been previously agreed upon between Mr. Pape and the Agency, Mr. Hagood put the top manager of the Corps on notice of the requirements for a cost allocation based on current and accurate data, and he further put management of the Corps in San Francisco on notice that he would not participate in preparing a false repayment contract. (See Tabs 12, 13 and 19). In July 1982, Mr. Hagood was transferred to Alaska, and he has not worked for the San Francisco District of the Corps since April 1982. Mr. Hagood had requested that his letter of notice be forwarded through Department of Army Channels to the Secretary of the Army. (See Tab 19, p. 7) This was not done. Mr. Hagood has requested this letter and other

materials through the Freedom of Information Act, and the letter has not yet been produced. It is believed that the letter was destroyed by individuals in the San Francisco District of the Corps.

In spite of the request for a current cost allocation and the requirements of the law, a proposed contract was forwarded for approval without a current cost allocation. (See Tab 20) It was subsequently represented to higher command that a current allocation had in fact been performed. (See Tab 23) In addition to the 1974 "Agreement" to pre-set the cost allocation, there is compelling evidence that the Sonoma County Water Agency did an "end-around" to have the false cost allocation and the contract approved. (See Tabs 25, 26, 27 and 28). There is evidence that the Agency enlisted the assistance of a United States Congressman to shepherd the contract through without a cost allocation. In fact, the contract was forwarded to the Assistant Secretary of the Army in the Pentagon on September 30, 1982, and it was signed less than a day later, despite the fact that it did not contain a valid and current cost allocation. (See Tabs 24 and 25).

When the Army Corps of Engineers went back to Congress to obtain additional appropriations for the enlargement and modification of Warms Springs Dam, assurances were given that the local interests (Sonoma County Water Agency) would pay for the additional costs of water supply. The following colloquy took place at the Senate hearings for Public Works Appropriations in fiscal 1968:

> Senator Ellender. Who gets the benefits of the additional water you are holding back?

General Dillard. The additional water is for water supply.
Senator Ellender. For water supply for what communities? Is there any recreation?
General Dillard. The water is for Sonoma and Marin Counties, sir. There is some recreation in the project.
Senator Ellender. *I thought we had some kind of rule maybe a law that required the community that would benefit from the additional water to pay the additional cost?*
General Dillard. *That is correct, sir. The cost of the water supply storage in the reservoir is repayable by the local interest. In this case we have a firm contract already signed for 132,000 acre-feet of water. This storage will be in three blocks. What we provide beyond that by increasing the size of the dam to maximize the water resource usage is a block of water which the Sonoma County Water Agency has given us assurance that they will contract for that block of water in addition to the repayment contract we already have.*
Senator Ellender. Will any of that be for recreation?
General Dillard. No, sir.
Senator Ellender. Just for the city use?
General Dillard. For industrial and residential use. Yes, sir.
Senator Ellender. What will the cost be to provide this additional water and how much of that cost will be paid by the city? While you are figuring that, I note you are allocating only $1,800,000 of the $2,700,000 appropriated for this project in fiscal year 1967. What is the reason for the reduction in the allocation of the funds appropriated for this project?

> General Dillard. Sir, the $1,800,000 excludes $900,000 taken for savings and slippages. This project reduction is for savings and slippages, because with adequate funding after fiscal year 1967, we could still complete the project on schedule. (Senate Hearings, Public Works Appropriations, 1968, H.R. 11641, p. 904) [Emphasis added.]

The costs of the Project in fact rose dramatically. Rather than comply with the law, an illegal agreement was reached between the Sonoma County Water Agency and local representatives of the Corps of Engineers to fix the percentage of cost allocated to water supply at 27.76% which was the estimate given in the 1969 General Design Memo. This illegal and unauthorized agreement was apparently made in 1974, and it was carried forward by Mr. Lingenfelter and Henry Pape's successor Jay Soper, reduced to writing and forwarded for approval without any reference to the "arrangement" which had been reached. To date, no valid and current cost allocation has been conducted, and all indications are the allocation for water supply would exceed 50% for this Project which has exceeded $300,000,000, all to the considerable detriment of the U.S. Treasury.

Both Mr. Hagood and I are prepared to fully cooperate with the Government in reviewing these and other materials in connection with this suit.

Respectfully submitted,

Lawrence G. Townsend

LGT:lm

cc: By Certified Mail/Return Receipt
The Honorable Edwin Meese, III
Washington D.C.

Mr. Michael F. Hertz
Director, Commercial Litigation Branch
Dept. of Justice
P.O. Box 261
Benjamin Franklin Station
Washington, D.C. 20044

Enc.: 1) Summons and Complaint
2) Order To Have Complaint Filed In Camera and Kept Under Seal
3) Order Setting Status Conference
4) 3-ring binder with 48 Tabs of documents

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July 9, 1982

Lt. Gen. J. K. Bratton
Chief Engineer
U.S. Army Corps of Engineers
Washington, D.C. 20314

Re: *Proposed Amended Contract Between the United States of America and the Sonoma County Water Agency for Water Storage in Lake Sonoma, Warm Springs Dam Project.*

Dear Lt. Gen. Bratton:

On June 28, 1982, the Sonoma County Water Agency ("Sonoma" or "Water Agency") filed with the Federal Energy Regulatory Commission a description of the distinctions between its existing contract for the storage of water at the Warm Springs Dam Project and the proposed contract amendment presently pending your review.[1] Certain statements made in that pleading are particularly striking and deserve your attention before any final action is taken on the draft agreement.

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[1] Attached as Appendix A.

In its pleading, the Water Agency states that one of the primary reasons for amending the present contract is because,

> "it is not possible to determine, under the terms of the original agreement, the dates when Sonoma's obligations to begin repayment for each block of stored water will arise."[2]

This is either a misstatement or a demonstration of Sonoma's fundamental misunderstanding of its existing contractual and statutory obligations under the 1958 Water Supply Act. That Act clearly provides that repayment is to commence when such water in storage "is first used" and that total repayment shall "in no event . . . exceed fifty years after the project is first used for the storage of water . . . " 43 U.S.C. Sec. 390(b).

In contrast, Sonoma claims that the,

> "new agreement, by establishing a schedule of fixed payments to be made regardless of when water is actually first used, assures that it is not economically detrimental for Sonoma to control releases from storage to optimize power production."[3]

This statement confirms our contention that the purpose of the proposed amendment is to permit Sonoma to realize the economic benefit of water stored at the Warm Springs Dam without rendering payment to the United States as required by Water Supply Act. The Act clearly demonstrates Congressional intent that the United States

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[2] *Id.* at 2.

[3] *Id.* at 3.

be compensated for, and upon, the derivation of benefits from water supplied by a Corps-operated facility. Sonoma's intent in negotiating a revised contract is clearly to receive the benefit of the water stored at Warm Springs without paying for it in accordance with the express directive of the Congress. Consequently, the above statement highlights the fact that approval of the proposed contract amendment by the Chief Engineer would be a deviation from the Corps' statutory authority and thus constitute an action *ultra vires* of the Water Supply Act.

Accordingly, the City of Ukiah herein reiterates its objections to the approval of the proposed contract amendment by the Chief Engineer.

Sincerely,

/s/ Robert A. O'Neil/FLK
Robert A. O'Neil

Attorney for the
City of Ukiah, California

Enclosures

RAO:FLK:ch

cc: Office of the Chief Engineer, DAEN:CWZG
Brig. Gen. Homer Johnstone, Jr., Division Engineer, South Pacific Division
Major Thomas Edgerton, District Engineer, San Francisco District
James P. Botz, Sonoma County Counsel